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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-939

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

HAROLD SCHMITTINGER, ESQUIRE
NICHOLAS H. RODRIGUEZ, ESQUIRE
WILLIAM D. FLETCHER, JR., ESQUIRE
P. O. Box 427
Dover, Delaware 19901
Counsel for Petitioners

April, 1980

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. pp. 1a-18a) is reported at 605

F.2d 710 (3rd Cir. 1979). The opinions of the District Court (Pet. App. pp. 20a-52a) are not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. pp. 18a-20a) was entered on September 18, 1979. The Petition for a Writ of Certiorari was filed on December 17, 1979, and was granted on February 19, 1980 (A. 102-103). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Plaintiff has complied with the time requirements of 42 U.S.C. §2000e-5(e) in this matter, when all actions complained of occurred prior to the 180 days

immediately preceding the filing of his alleged discrimination claim with the Equal Employment Opportunity Commission on the basis that the Plaintiff continued to be affected by these actions up through the date that his employment relationship expired with the Defendants.

2. Whether a cause of action under 42 U.S.C. §1981 accrued for the purposes of applying the pertinent statute of limitations at the time that these alleged discriminatory acts were performed and Plaintiff had notice of the same or was Plaintiff entitled to forego seeking relief for these alleged discriminatory actions until his employment relationship with the Defendants ceased to exist?

STATEMENT

Respondent, Columbus B. Ricks, a black male Liberian filed an action against the Petitioners, Delaware State College and the individuals who are or were employees and officials of the College, claiming employment discrimination on the basis of national origin. Ricks filed this action in the United States District Court for the District of Delaware on September 9, 1977. Ricks invoked the jurisdiction of the District Court on the basis of 42 U.S.C. §2000e et seq., and 28 U.S.C. §§1331 and 1343(3) and (4).

Ricks began his employment relationship with Delaware State College, a predominantly black educational institution located in Dover, Delaware, during September of 1970 (A. p. 33). From that

time through June 30, 1975, Ricks entered into a series of one academic year contracts with Delaware State College. All of these contractual periods of employment were fully performed by Ricks (A. p. 91).

In February, 1973, Ricks was considered for tenure and denied the same at that time by the Committee on Promotions and Tenure of the faculty of Delaware State College. However, he was offered another one academic year contract and would be reconsidered for tenure status during the following year (A. p. 16). Thereafter, in February of 1974, the College's Committee on Promotions and Tenure reviewed Ricks' status again and again recommended that he be refused tenure (A. p. 20). It was further recommended that, as a result of the tenure denial and in accordance with

established school policy, Ricks would be offered a terminal academic year contract of employment.

On or about March 13, 1974, the Board of Trustees of Delaware State College met and accepted the Committee's recommendations. (Pet. App. p. 3a). Thereafter, Ricks filed a grievance in April of 1974 with the Educational Policy Committee (A. pp. 49-52). A hearing on the Ricks matter was conducted by this Committee in May of 1974. The Educational Policy Committee determined that Ricks' grievance should be denied and that the decision to deny Ricks tenure should remain unchanged. The decision of the Educational Policy Committee was accepted by the Board of Trustees and conveyed to Plaintiff Ricks by letter of September 12, 1974 (A. p. 21). The denial of Ricks' grievance by the Educational Policy Committee has not

been alleged to have been a discriminatory decision, nor has it been alleged that any actions by this Committee or its members, acting as such, regarding its decision were done in any discriminatory manner.

As a result of Ricks being denied tenure status, the Board of Trustees in June of 1974 notified him, in accordance with the policies of Delaware State College, regarding teaching employees not granted tenure, that the College would offer Ricks a terminal year contract for the academic year September 1, 1974, through June 30, 1975. Ricks accepted this terminal year contract and the same was performed in full. On April 4, 1975, Ricks filed a charge of employment discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC). On June 30, 1975, Ricks terminal year contract with Delaware State College expired.

The District Court dismissed all of the counts of the Complaint filed by Ricks on the basis that the same were untimely. (Pet. App. pp. 20a-44a). From that decision of August 30, 1978, Ricks sought reconsideration by the District Court, which was denied on October 16, 1978. (Pet. App. pp. 45a-52a).

Though the District Court judgments dismissed the Plaintiff's entire complaint, Counts I through VI inclusive, Plaintiff only appealed his claims under 42 U.S.C. §§1981 and 2000(e). The Court of Appeals held that for purposes of determining when Plaintiff's cause of action accrued for his alleged unlawful denial of tenure the date of June 30, 1975, when his terminal year contract expired would be utilized, rather than the time when the decision to deny Plaintiff

tenure status was made and conveyed to him, June 26, 1974. Further, the Court of Appeals determined that the actions of the Defendants in denying Plaintiff tenure constituted a "continuing discriminatory act" for which the Plaintiff could file a complaint with the EEOC at least as early as April, 1975, and as late as 180 days subsequent to June 30, 1975, in order to meet the time requirements of 42 U.S.C. §2000e-5(e).

Concerning Plaintiff's 42 U.S.C. §1981 claim, the Court of Appeals held for purposes of filing a timely action challenging the denial of tenure decision, Plaintiff need only file a complaint within three years from June 30, 1975. The Court of Appeals offered no explanation for this determination other than to rely upon the reasoning it offered

for finding the Plaintiff's 42 U.S.C. §2000e (hereinafter referred to as Title VII) claim to have been timely filed.

STATUTES INVOLVED

(1) 86 Stat. 105, (1972) Title 42 U.S.C. §2000e-5(e), Page 1241 (1976 Ed.). Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local authority.

> A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charges made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person within 300 days after the alleged unlawful employment practice occurred, or

> within 30 days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) 16 Stat. 144 (1871), Title 42 §1981, Page 1216 (1976 Ed.). Equal rights under the law.

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SUMMARY OF ARGUMENT

I. Defendants denied Plaintiff tenure status at Delaware State College not later than June 26, 1974. At this time Defendant was also notifed that he would be offered a terminal year contract

to run from September 1, 1974, through June 30, 1975, which Plaintiff was free to accept or reject in accordance with the established college policies pertaining to teaching employees who had been denied tenure status. As such, these decisions and actions of the Defendants come with the parameters of "employment practices" as defined in 42 U.S.C. §2000e-2(a)(1). As such practices, an alleged aggrieved employee is required to file a complaint against the employer within 180 days of the occurrence of any alleged unlawful employment practice pursuant to 42 U.S.C. §2000e-5(e). The rule of United Air Lines v. Evans, 431 U.S. 553 (1977) holds that the failure of a Plaintiff to file such a claim challenging these discrete, distinguishable, and identifiable employment occurrences, within the time period provided, bars the employee from

asserting them at a later date under the pretext of a "continuing violation." The rule of Evans specifies that the failure of an employee to file a timely complaint allows the employer to treat the alleged discriminatory action as if it were lawful, and said acts have no greater legal consequence than an alleged discriminatory act committed prior to the enactment of Title VII.

The rule of Evans also established the legal principal that a discriminatory act does not constitute a "continuing violation", for the purposes of determining when a timely complaint must be filed with the EEOC, simply because the effect or impact of such an alleged discriminatory act continues beyond the date upon which the act occurred. Rather, it must be determined whether a present act

or violation exists within the immediate 180 days prior to the date of filing a complaint under Title VII.

The Plaintiff in this matter filed a complaint with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) on April 4, 1975. Plaintiff can cite no violations or actions committed by the Defendants that occurred within 180 days prior to this filing pertaining to his denial of tenure by the Board of Trustees of Delaware State College. The only date relied upon by the Plaintiff for this filing is that of June 30, 1975, the date at which his terminal year contract expired. (A. p. 99). The decision to deny Plaintiff tenure in June of 1974 certainly had an effect and impact upon the Plaintiff thereafter. However, Plaintiff can point to no actions taken by the Defendants that

would allow his filing to be considered timely. Thus, the decisions to deny him tenure and offer him a terminal year contract for purposes of a Title VII action can be treated by the Defendants as lawful and have no greater legal effect than acts that occurred prior to the enactment of this statute.

The Court of Appeals for the Third Circuit in reversing the District Court's decision which found the Plaintiff's Title VII action to be untimely, held that the denial of tenure constituted a continuing violation which could ripen for a complaint at any time up to 180 days subsequent to the expiration of the terminal year contract. The Court of Appeals determined that it was permitted to utilize this "continuing violation" concept despite the holding by this Court

in Evans on the basis that Evans should only apply to situations where a termination has already occurred, and the employee is attempting to utilize that termination in a subsequent claim for relief. Thus, the Court of Appeals reasoned that since a termination had not occurred at the time that Plaintiff was denied tenure, he would be free to file a claim for this denial up to 180 days subsequent to his termination.

This determination by the Court of Appeals espouses a policy entitling an employee, at the time of his termination or expiration of employment, to file within 180 days thereof a complaint citing any type of employment occurrence that transpired during his term of employment as a basis for a timely Title VII complaint. Such a policy is directly contrary to the holding in United Air Lines v. Evans and the language and policy

requirements of Title VII. Under the Court of Appeals determination, the 180-day time requirement would have no application to occurrences that arose during the employment relationship, but rather would only apply to those occurrences when that relationship ends. Thus, the language of 42 U.S.C. §2000e-2(a)(1) becomes meaningless as to matters other than terminations. Moreover, stale claims which may be impossible for Defendant employers to explain or defend can now serve as the basis for a valid Title VII action under the Third Circuit policy.

The policy of allowing employment practices that occurred during the term of employment to ripen for purposes of filing a Title VII complaint within 180 days of termination has not been followed by other Courts of Appeals. These Courts have held

that employment practices occurring during the term of employment must be filed within 180 days of there occurrence or they shall be barred, Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980); Farris v. Bd. of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Martin v. Georgia-Pacific Corp., 568 F.2d 58 (5th Cir. 1977); Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) (this case dealt with a timely filing relative to the enactment date of Title VII).*

*The Court of Appeals relied upon two Second Circuit cases decided prior to United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); Egelston v. State University College at Genesco, 535 F.2d 752 (2d Cir. 1976) and Noble v. University of Rochester, 535 F.2d 756 (2d Cir. 1976). The latter cases is irrelevant to a tenure situation and the former concerned an alleged policy of sex discrimination in salaries. Moreover, their limited precedential value was noted by the Second Circuit in Smith v. American President Lines, Ltd., 571 F.2d 102 (2d Cir. 1978).

II. Plaintiff claims that Delaware State College discriminated against him in denying him tenure status on the basis of his national origin. In determining the applicable statute of limitations for this claim pursuant to the dictates of Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the District Court determined that the general three year statute of limitations found in 10 Del. C. §8106 would be applicable to these claims. Since the complaint was filed on September 9, 1977, Plaintiff would be barred from recovering upon any causes of action that accrued prior to September 9, 1974. The determination to deny Plaintiff tenure and award him a terminal year contract was made not later than June 26, 1974. Thus, if these decisions are alleged to have been discriminatory, an action seeking relief from the same of

necessity had to be filed on or before June 26, 1977. This Plaintiff failed to file such suit and, therefore, claims arising out of this denial of tenure and offer of a terminal year contract are barred by the applicable three year statute of limitations.

A complaint brought under §1981 needs to allege that the Plaintiff's employment was unlawfully and discriminatorily denied him by the Defendants. Plaintiff relies upon the date that his terminal year contract expired as time when these discriminatory acts accrued. However, Plaintiff has not alleged any discriminatory actions pertaining to the offer, acceptance, terms, and performance of his employment contract which expired on June 30, 1975. Thus, this date adds nothing to the Plaintiff's discrimination complaints pertaining to tenure.

On the basis of the rule noted in United States v. Kubrick, __ U.S. __ 62L Ed 2d 259 (1979) a person must file his claim against the Defendant not later than the time that he is aware of the alleged injury caused by the Defendant. In the present matter, Plaintiff clearly understood and was aware of the Defendants' actions to deny him tenure and to offer him a terminal year contract not later than June 26, 1974. Plaintiff has offered no other subsequent discriminatory acts from which to base his claim for employment discrimination under §1981, and, therefore, this claim is barred by the applicable three year statute of limitations.

Moreover, Plaintiff has failed to comply with the applicable statute of limitations, as noted in Urie v. Thompson,

337 U.S. 163 (1949). There this Court stated that the purpose of a statute of limitations is to require one to take action within a specific period of time after a party has received notice of the invasion of his legal rights. Clearly, Plaintiff had more than sufficient notice of this alleged invasion of his rights on or before June 26, 1974. Consequently, Plaintiff is not entitled to sleep upon these rights and attempt to assert them on the basis of an unrelated and inconsequential date approximately one year thereafter.

ARGUMENT

I. PLAINTIFF FAILED TO COMPLY WITH THE TIME LIMITATION REQUIREMENTS OF 42 U.S.C. §2000e-5(e) WHEN HE FAILED TO FILE A CHARGE OF DISCRIMINATION WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION WITHIN 180 DAYS OF THE DAY UPON WHICH HE WAS DENIED TENURE STATUS BY DELAWARE STATE COLLEGE SINCE

SUCH A DECISION DOES NOT CONSTITUTE A "CONTINUING VIOLATION" RELIEVING ONE OF COMPLYING WITH THE REQUIREMENTS OF 42 U.S.C. §2000e-5(e).

Plaintiff's charge of discrimination was filed with the EEOC on April 4, 1975. As indicated by the complaint, Plaintiff's basic allegation relates to the Defendants' decision to deny him tenure status on the faculty of Delaware State College.

In light of the determination to deny Plaintiff tenure and in accordance with the established policies of Delaware State College, the Plaintiff was notified on or about June 26, 1974, that though Plaintiff would not receive tenure status with Delaware State College, he would be offered the appropriate terminal year contract which would take effect from September 1, 1974, through June 30, 1975.

Plaintiff could point to no allegations concerning the actions of the Board of Trustees occurring on or after October 7, 1974, up to the date of Plaintiff's filing with the EEOC. Rather, the only alleged act asserted by Plaintiff subsequent to October 7, 1974, is the date when Plaintiff's last contract with Delaware State College expired by its own terms, i.e. June 30, 1975. It is on the basis of this date, that Plaintiff asserts his claim to have been timely filed.

This Court's recent decision in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) clearly supports the determination made by the District Court in this matter. In Evans, this Court was asked to determine whether violations of Title VII existed where an employer was refusing to credit an employee with seniority for her prior service which had

been allegedly terminated on a discriminatory basis. No violation was found to exist in Evans, though the present seniority system continued to have an adverse impact on the terms and conditions of that Plaintiff's employment. However, it was noted that the employer was entitled to treat past acts of discrimination as lawful after the employee failed to file a timely charge of discrimination regarding the same. Moreover, it was determined that

> "A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." United Air Lines, Inc. v. Evans at p. 558.

In light of the holding in United Air Lines v. Evans, it is encumbant upon the Plaintiff to identify some present violation that existed within 180 days of

the date upon which he filed his complaint with the EEOC. As noted by the District Court (Pet. App. p. 28a), the date upon which such a present violation must have occurred on or thereafter was October 7, 1974. However, as admitted by Plaintiff, there are no acts of the Board of Trustees which occurred subsequent to October 7, 1974, which would constitute a present violation pertaining to the denial of tenure up to the date of the Plaintiff's filing. Therefore, the actions of the Defendants which were not made a part of a timely filing are entitled to be treated as lawful actions or actions which occurred prior to the enactment of Title VII. Thus, the decision to deny Plaintiff tenure and to offer him a terminal year contract cannot now be treated as unlawful discriminatory actions.

In an attempt to avoid the consequences of his failure to file a timely charge of discrimination concerning the denial of tenure status, Plaintiff maintained that the alleged discriminatory denial of tenure did not accrue for the purposes of filing a claim under Title VII until his employment ceased (A. p. 99). The only rationale offered by Plaintiff for his position is that the Board of Trustees still had the power to reverse its decision and grant tenure until June 30, 1975 (Pet. App. p. 30a). The District Court rejected this contension, noting that such hypotheticals cannot serve as the basis for reviving a stale claim (Pet. App. pp. 30a, 31a).

In light of the holding of this Court in United Air Lines, Inc. v. Evans, the District Court determined that the expiration date on the terminal year

contract added nothing to the Plaintiff's claim concerning the Defendants' denying him tenure status. For example, in light of the Plaintiff's failure to timely challenge the Defendant's decisions concerning tenure and the offering of a terminal year contract, the Defendants are entitled to treat those decisions as lawful acts or acts concluded prior to the enactment of Title VII. Therefore, when the employment contract expired by its own terms in June of 1975, Plaintiff had no greater rights than any other teacher who had been denied tenure and permitted to perform his terminal year contract. Since the performance of this contract, in light of a denial of tenure, has not been challenged by the Plaintiff as a discriminatory practice utilized against Plaintiff but not other persons who were

denied tenure, this practice is neutral on its face. Thus, completion of this neutral practice creates no new claims for relief under Title VII. A similar result was reached by this Court in United Air Lines, Inc. v. Evans at page 559, n. 13, where it was noted that:

> At the time she was rehired in 1972, Respondent had no greater right to a job than any other applicant for employment with United. Since she was in fact treated like any other applicant when she was rehired, the employer did not violate Title VII in 1972. And if the employer did not violate Title VII in 1972 by refusing to credit Respondent with back seniority, its continued adherence to that policy cannot be illegal.

In addition to the expiration of the employment contract on its own terms being insufficient to create any new rights in the Plaintiff for a Title VII claim,

Plaintiff has failed to offer any logical basis for holding that the statute of limitations for the denial of tenure should accrue in June of 1975, rather than at the time that those decisions were made and communicated to the Plaintiff. As already noted (Pet. R. Br. p. 2), Plaintiff's contract at the time that the Board advised him of the denial of tenure and offered him a final year contract, was under contract with Defendants only through June 30, 1974. Thus, it was the Plaintiff's decision to accept the "terminal year" contract that extended his employment relationship through June 30, 1975. Had Plaintiff not accepted this contract, Plaintiff would have no basis for attempting to evade the applicable timely filing requirements of Title VII.

Thus, Plaintiff seeks to extend the running of the statute of limitations against him by accepting an additional year's employment.

The Court of Appeals for the Ninth Circuit dealt with an almost identical situation in the case of Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979). In Abramson, the Ninth Circuit dealt with a denial of tenure claim that was factually very similar to the present matter. Here, the plaintiff was employed on four one-year contracts. Tenure considerations were made by the appropriate faculty and administrative personnel during the 1970-1971 school year. In June of 1971, Abramson was informed that she would not receive tenure and was offered a "terminal year" contract of employment for the 1971-1972 academic year which she accepted. Shortly after

this terminal year contract expired in June of 1972, Abramson filed a charge with the EEOC claiming that she was denied tenure status on the basis of her sex which was unlawful and discriminatory.

In the case, the plaintiff had to show some discriminatory action taken by the University after March 23, 1972 to have a valid timely claim. Specifically, the Court of Appeals noted that if the denial of tenure was final prior to March 24, 1972, and no other discriminatory acts occurred subsequent to that date, then the employee's complaint would be invalid.

In attempting to provide the Court of Appeals with an event that occurred subsequent to March 24, 1972, the employee maintained that the expiration date of the terminal year contract could be used as

the discriminatory occurrence subsequent to March 24, 1972, upon which to base her denial of tenure claim.

The Court of Appeals specifically rejected that claim and noted the following:

> "In this case, Appellant was employed under a series of one-year contracts, none of which at the time of the June, 1971, decision extended Appellant's employment to or beyond March 24, 1972. Nevertheless, the University was obligated upon the June, 1971, decision to offer her a terminal year. It could be argued, therefore, that inasmuch as the consequences of the tenure denial extended at least until the expiration of the terminal year, Appellant has a Title VII cause of action. We believe, however, that the Pennsylvania district courts misdirected their attention. The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful. Liability of the Appellees must be premised on discriminatory action taken by them on or after March 24, 1972,

> if the tenure decision was final prior to that date, and no other discriminatory action took place thereafter, Appellant's action was properly dismissed." Abramson v. University of Hawaii, 594 F.2d 202 at 209.

Thus, the Court of Appeals for the Ninth Circuit agreed with the District Court in the present matter that the proper focus is upon the time that the allegedly discriminatory act occurred, and not upon the times when the consequences, impact, or effects of such actions are noticed. The decisions of these two Courts is consistent and in accord with the holding of this Court in United Air Lines v. Evans, 431 U.S. 553, 558.

In reviewing and deciding the present matter, the Court of Appeals for the Third Circuit determined that the 180-day period for filing a charge of discriminatory denial of tenure did not begin to run

until the terminal year contract expired on June 30, 1975. This date was determined by the Court of Appeals to be the beginning date for the running of the time requirements of Title VII despite the fact that the complaint under Title VII was filed approximately three months prior to that date, April 4, 1975. The Court of Appeals supports its determination as to the operative date for filing a discrimination claim in this matter by noting that in some instances decisions have been reconsidered and sometimes reversed in employment situations. (Pet. App. pp. 9a-10a). However, while noting that decisions may be reversed, the Court of Appeals failed to identify any unexhausted internal procedures for such a review that the Plaintiff utilized or could have utilized on or after October 7, 1974. In fact, there were no such procedures in

existence nor does Plaintiff allege or maintain that any existed. Therefore, mere speculation as to the possible reversal of the tenure decision, in the total absence of any basis for the same, should not be the foundation for disregarding the filing requirements of Title VII. In fact, even when such refusals have been made, it has been held that the same do not "breath life into stale claims," Meyers v. Penny Pack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977).*

The Court of Appeals also reasoned that it would be unfair to require

*Such informal requests and refusals were found to be insufficient by this Court to resurrect old claims. United Air Lines, Inc. v. Evans, at 556.

employees to file discrimination charges during their terms of employment, since such filings would require the employee to determine when a decision is final and employees may lose their opportunity to file a charge if they proceed with internal resolution of their grievances (Pet. App. p. 12a).** As already noted, all internal procedures for resolving this matter had been concluded more than 180 days from the time that Plaintiff filed his complaint with the EEOC. Moreover, a decision to deny one tenure status is a clear, identifiable, discrete act which any lay person can surely understand and act upon when notified of the same. It is no different or any more complex than a

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*This rationale for relieving an employer of his obligation to pursue his Title VII remedies was rejected by this Court, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 236 (1976)

transfer, promotion, or other employment determination that requires one to act within 180 days of its occurrence in order to comply with the filing requirements of Title VII, see 42 U.S.C. §2000e-2(a) for definition of unlawful employment practices.

Though the Court of Appeals for the Third Circuit held that the 180-day period for filing a claim concerning alleged discriminatory denial of tenure runs from the date of the expiration of the terminal year contract, the Court nevertheless held that the filing of a charge approximately three months before that date was timely because his claim had matured by that time (Pet. App. pp. 13a, 14a). This determination is based, in part, upon the Court classifying the denial of tenure decisions to be "continuing violations" at least

from the time that they occurred through the date that the terminal year contract expired.

Admittedly, the decision to deny tenure has an effect and impact upon the Plaintiff after it has been rendered, as do most employment decisions. However, as this Court noted in United Air Lines v. Evans, 431 U.S. 553, 558, the critical question is not whether the actions of an employer have a continuing impact or effect upon the employee, but rather whether there is any present violation in existence within the time requirements for filing a complaint with the EEOC. It is quite clear that no present violation existed on June 30, 1975, and neither the Plaintiff nor the Court of Appeals offer any factual basis for finding that the procedure for denying Plaintiff tenure occurred at any time on or after

October 7, 1974. Thus, the acts occurred and were known to the Plaintiff at a time when he should have filed a complaint with the EEOC and failed to do so.

The time requirements of Title VII as established by the Congress, are short and require an employee to act promptly and not sit on his rights. Yet, under the rationale offered by the Court of Appeals, this employee would be entitled to wait more than a year after his employer had determined to deny him tenure before the time limitations even began to run. Clearly, this approach frustrates the very purpose and policy of the time requirements found in Title VII. Acceptance of this revived "continuing violation" doctrine would result in numerous stale claims asserted against employers well beyond the appropriate time for action as required by the statutory mandate of Title

VII. The approach taken by the Court of Appeals adopts a policy of allowing all stale employment practices to ripen for litigation at the time of termination. Acceptance of this would emasculate the purpose and intent of 42 U.S.C. §2000e-5(e).

The impact of a determination to deny one tenure status clearly can be claimed to effect the employee for many years in the future. Since tenure status gives a person an indefinite employment position for the rest of his working days, a decision not to grant one such a position not only affects the employee adversely one year subsequent to the decision but adversely affects the employee each year thereafter. Thus, if impact, were the basis for determining when a timely filing must be made, the time requirements of

Title VII would never run on a tenure decision until the employee has retired from the work force. However, it is clear that impact is not the determining criteria for when a claim under Title VII must be filed. Rather, as statutory language clearly states, it is to be "within 180 days after the alleged unlawful employment practice occurred," 42 U.S.C. §2000e-5(e). Since a denial of tenure is clearly an employment practice as defined by 42 §2000e-2(a), Plaintiff was required to file a complaint concerning this decision not later than 180 days subsequent to its occurrence. By not filing until April 4, 1975, the Plaintiff failed to make a timely filing, and Defendants were entitled to treat their decision denying Plaintiff tenure as a lawful one having no adverse legal consequences.

The Court of Appeals for the Third Circuit noted that United Air Lines, Inc. v. Evans, 431 U.S. 553, had no application to the present matter since the Evans ruling only applied to situations where an actual termination occurred with the employee attempting to obtain relief subsequent to that termination on a claim that subsequent effects from the termination amount to a "continuing violation." Admittedly, this Court's decision in Evans 431 U.S. 553, did involve a termination. However, neither the language and rationale of Evans, nor the applicable statutes, nor the decisions of other Courts of Appeal support this narrow application of the Evans decision. The recent case of Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980) amply illustrates the refusal of other Courts of

Appeal to limit the rule of Evans to termination situations. In this case, the Court of Appeals for the Fifth Circuit reviewed an employee's claims that he was denied promotions and transfers during his term of employment. The Plaintiff also alleged that the employer used a discriminatory testing system concerning these alleged unlawful employment practices. In Gonzales, the Court noted at page 249 that:

> "A past act of discrimination for which a party did not file a charge of discrimination with the EEOC within the limitations period is legally equivalent to a discriminatory act that occurred before the enactment of Title VII. Although such a past discriminatory act may continue to effect an employee's present pay and fringe benefits, such an effect does not constitute a continuing violation of Title VII."

The Court further noted that when an employer is charged with having engaged in discriminatory conduct which involves discrete acts of the employer and said acts occur more than 180 days prior to the filing of a charge with the EEOC, then as to those discrete acts, no complaint can be heard as the same is untimely despite the fact that it may still adversely affect the employee. The Court also noted that a failure to promote an employee, if said failure occurred more than 180 days prior to the filing of the employee's charge, then such an action cannot form the basis of a timely Title VII complaint. The Court further determined that a failure to promote does not constitute a continuing violation. This reasoning is most consist with the policy set out by this Court in Evans. Applying it to the present matter, this policy would deter-

mine that a denial of tenure, though it continues to affect an employee, does not amount to a continuing violation for the purposes of evading the filing requirements of filing Title VII.

Additional support and reasoning for this position is found in Hodge v. McLean Trucking Co., 607 F.2d 1118 (5th Cir. 1979). In this case, the Court was concerned with an allegation of discrimination pertaining to a refusal to hire a particular employee. The employee maintained that this refusal to hire presently affected his current rights under an existing racially neutral seniority system. The Court noted that a claim based on these past acts of discrimination cannot now be brought on the basis that the same continue to

adversely affect the employee. Yet, in contrast to this holding, this is precisely what the Court of Appeals is attempting to assert here.

Under the policies of the College, a person denied tenure status is offered a terminal year contract. This policy applies both to Plaintiff and to any other person similarly situated. The running of this terminal year contract is nothing more than a neutral policy of the College. No where did the present Plaintiff allege or the Court of Appeals hold that as an employee denied tenure he was entitled to anything more than the offering of this terminal year contract. Thus, the performance of this contract is neutral and does not raise any additional discriminatory acts beyond the act of denying the Plaintiff tenure which occurred in June of 1974.

Additional support for the position that the rationale and application of the United Air Lines, Inc. v. Evans policy applies to employment occurrences that arise during the course of one's employment are found in Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) (which dealt with allegations of an employee that promotions and tests for promotions which occurred more than 180 days before the filing of a discrimination charge with the EEOC were barred); Farris v. Bd. of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978) (employee claims of being denied full seniority rights due to earlier maternity leave held to be untimely asserted); Martin v. Georgia-Pacific Corp., 568 F.2d 58 (5th Cir. 1977) (employee charged employer with discriminatory seniority practices but failed

to file a timely charge for this alleged discrimination and Court held it barred by 42 U.S.C. §2000e-5(e)).

On the basis of the above cited authority, Defendants maintain that the decisions of Delaware State College to deny Plaintiff tenure status occurred more than 180 days from the time that he filed his complaint with the EEOC. Thus, Plaintiff is barred from pursuing his discrimination claim on this basis and cannot attempt to revive the same by alleging that the effects of this decision transform these employment occurrences into a continuing violation at least through the expiration date of his final year contract with Delaware State College.

II. PLAINTIFF'S CLAIM FOR DENIAL OF TENURE STATUS WAS NOT TIMELY ASSERTED AGAINST THE DEFENDANTS UNDER 42 U.S.C. §1981, AND IS, THEREFORE, BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

As in his Title VII claim, Plaintiff appealed to the Court of Appeals after the District Court dismissed his claim under 42 U.S.C. §1981 on the basis of it being barred by the applicable statute of limitations. Concerning this claim, the District Court determined that a cause of action for Plaintiff's denial of tenure status accrued not later than June 26, 1974, when the Board notified him of its determination to deny him tenure and offer him a terminal year contract. On appeal to the Third Circuit, Plaintiff maintained that the District Court erred by failing to use the expiration date of the terminal year contract, June 30, 1975, for purposes of applying the applicable statute of limitations for a §1981 action (A. p. 100-102).

Since 42 U.S.C. §1981 does not contain its own designated federal statute of limitations, this statute utilizes the most analogous state statute available in the forum where the suit is filed, Johnson v. Railway Express Agency, 421 U.S. 454 (1975). The District Court in Delaware has held that the most analogous state statute for purposes of a §1981 claim is that found in 10 Del. C. §8106, the general three year statute of limitations. The application of this statute to the present matter is not disputed by the parties.

Plaintiff's complaint was filed on September 9, 1977. Thus, Plaintiff is barred from recovering upon any claims arising out of allegedly discriminatory acts occurring prior to September 9, 1974. This was the rule utilized by the District

Court in this matter (Pet. App. p. 35a). In both the District Court and the Court of Appeals, the Plaintiff maintained that his cause of action did not accrue until the terminal year contract expired. However, the District Court noted that for purposes of applying the applicable statute of limitations, a cause of action accrues at the time that the Plaintiff could have sued the Defendants for allegedly denying him tenure status on a discriminatory basis. The Court further noted that the statute of limitations begins to run when the cause of action has accrued.

This analysis by the District Court for applying the statute of limitations is consistent and in accordance with the standards long utilized by this Court. In the case of Urie v. Thompson, 337 U.S. 163 (1949), this Court discussed the purposes

of statute of limitations and noted how they are to be applied. As a general proposition, the traditional purposes of the statute of limitations was to insure and require that an injured party take legal action within a specific period of time after the party received notice of the invasion of his legal rights. As outlined in Argument I, the Plaintiff in the present matter knew of the Defendants' actions denying him tenure and awarding him a terminal contract not later than June 26, 1974. If these actions amounted to an invasion of Plaintiff's legal rights as he alleges, then he had the responsibility to seek legal redress for the same within three years from that date. His failure to do so bars him from seeking relief for these actions at a later time. The only identifiable act offered by the

Plaintiff and the Court of Appeals for determining that the Plaintiff's §1981 action was in fact timely filed is the expiration date of his terminal contract, June 30, 1975. Though utilizing this date, no reasons are offered for the same other than a reliance upon the position that the Title VII action was also timely filed on the basis of this date.

The purpose of §1981, inter alia, is to protect one against alleged discriminatory acts regarding the employment relationship. However, as previously noted, there are no allegations that the terms and conditions of this Plaintiff's employment subsequent to his denial of tenure status were in any way different from the terms and conditions the Defendants would afford any other person denied tenure. Thus, the offering, execution, and performance of the terminal

year contract in accordance with its terms cannot form the basis for a discrimination claim when this policy and the Defendants' actions in furtherance of it have not been alleged to be discriminatory. Rather, the discriminatory act was the Defendants' refusal to grant Plaintiff a permanent, indefinite position with Delaware State College. It is this refusal that the Plaintiff claims was discriminatory and these acts occurred not later than June 26, 1974. Thus, failing to file a complaint against the Defendants not later than June 26, 1977, bars the Plaintiff from receiving relief due to the Defendants refusal to grant him tenure.

Recently, this Court had the opportunity to review the appropriate application of a statute of limitations in the case of United States v. Kubrick, __ U.S. ___, 62 L. Ed.2d 259 (1979). In

reviewing the appropriateness of statute of limitations, this Court noted in Kubrick at page 266 that:

> Statute of limitations, which 'are found and approved in all systems of enlightened jurisprudence' [citations omitted] represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free from stale claims in time comes to prevail over the right to prosecute them.'

Further, it was noted by this Court that these statutes protect Defendants and the Courts from having to deal with cases in which the factual determination of the matter is seriously hampered by the passing of time. In the present matter, it is clear that the Plaintiff is challenging the Defendants' determinations to deny him tenure, yet, the Plaintiff and the Court of Appeals both agree that in

addition to the three years that the Plaintiff had to bring this action, he should have the additional year comprising the terminal year contract. It was determined that Plaintiff is entitled to this additional time, though the terms, performance, and execution of the contract are not at issue in the Plaintiff's complaint. Thus, the determination by the Court of Appeals frustrates the purposes of the statute of limitations and should not be approved of by this Court.

In applying the pertinent statute of limitations in a recent case, the Court of Appeals for the Fifth Circuit in Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), noted the following concerning the application of the statute of limitations in a §1981 case at page 1255:

> "Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the last date on which Defendants improperly harmed Plaintiffs.... recoveries limited to those violations occurring within the two year period immediately preceding the filing of the complaint or thereafter."

Applying this rule to the present matter, the harm complained of by the Plaintiff occurred not later than June 26, 1974, when tenure was denied him and he was granted a terminal year contract. No harm arose out of the performance of the terminal year contract itself and, thus, the date of its expiration cannot serve as the accruing of Plaintiff's cause of action for being denied tenure.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the dismissal of the complaint against Petitioners (Pet. App. pp. 17a-19a) should be reversed.

Respectfully submitted,

HAROLD SCHMITTINGER, ESQUIRE
NICHOLAS H. RODRIGUEZ, ESQUIRE
WILLIAM D. FLETCHER, JR., ESQUIRE
P. O. Box 427
Dover, Delaware 19901
Counsel for Petitioners

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